No. 83-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL ANGELO MELDISH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB KOSSMAN,
1325 Spruce Street
Philadelphia, PA 19107
(215) 735-5084

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a non-violent Customs offense, 18 U.S.C. § 542, is a predicate offense under the Gun Control Act of 1968.

II. Whether the Gun Control Act as applied to this case creates an irrational classification between non-violent trade regulation offenses and other similar non-violent offenses in violation of the Due Process Clause of the Fifth Amendment.

III. Whether hunting weapons are "firearms" under the Gun Control Act of 1968.

PARTIES TO THE PROCEEDING

The only parties to this proceeding are those named in the caption of the case.

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, A-1 - A-7) is not yet reported. The bench opinion of the district court is reproduced in Appendix C, *infra*, A-11.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, A-9) was entered on November 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. **United States Constitution.** The Fifth Amendment to the Constitution provides:

> * * * nor shall any person . . . be deprived of life, liberty, or property, without due process of law * * *

2. **The Gun Control Act of 1968, 18 U.S.C. §§ 921-928.** Relevant sections of the Gun Control Act provide in pertinent part as reproduced herein at Appendix D, (A-18- A-22).

3. **Chapter 27, Customs, U.S. Criminal Code, 18 U.S.C. §§ 541-552.** The relevant sections of the chapter on Customs in the Criminal Code provides in pertinent part as reproduced herein as Appendix D (A-22).

STATEMENT

This federal criminal prosecution resulted in petitioner's conviction of two offenses under the Gun Control Act of 1968. Jurisdiction of the district court (S.D.N.Y.; Ward, D.J.) is based upon 18 U.S.C. § 3231. While the case was tried before a jury, the facts are not in dispute.

In 1982, petitioner purchased two Browning 2000 shotguns (A 93)[1] and two John Wayne commemorative rifles (A 108) from the Allsports Sporting Store, an established and reputable seller of sporting goods in Yonkers, New York (A 65). The buyer simultaneously purchased a hunting license from the sporting goods store (A 31-33, 37-38, 180-181).[2] An Allsports salesman, using information supplied by petitioner, filled in Firearm Transaction Record forms to identify petitioner as the purchaser of the four weapons. (A 95, 104). The trial court found that the weapons purchased by petitioner were of the kind ordinarily used by sportsmen for hunting and recreational use.[3] (A 180-181).

[1] Citations to pages with the prefix "A" refer to the Joint Appendix in the Court below.

[2] The trial court refused to permit petitioner to introduce evidence concerning the purchase of the hunting license before the jury (A 31-33, 37-38). While the government did not contest the fact that petitioner had purchased the hunting license, the government objected that evidence concerning the purchase of the hunting license should not be presented to the trial jury.

[3] The trial court did not permit petitioner to introduce evidence before the jury to show the character of the weapons. At the close of the evidence, the trial court stated to counsel for petitioner:

> You have preserved your point, I have precluded you from putting in proof that they are sporting weapons . . . . I have ruled that whether or not they are sporting weapons, and I will tell you that I believe they are and I will even add that they may well be, at least two of them may have cultural value – I have ruled that this is not an issue in this case, and it is not a question for the jury. It is a legal question which, after hearing from you, I have determined. That would leave you, in my judgment, with an appropriate appeal. (A 180-181).

This transaction became a federal criminal prosecution under two related sections of the Gun Control Act of 1968.[4] Section 922(h)(1) of that Act prohibits receipt of a firearm by persons previously convicted of certain defined crimes. Petitioner had been convicted of a Customs offense four years earlier. The courts below held that this conviction was a predicate offense for purposes of § 922(h)(1). Section 922(a)(6) of the Gun Control Act prohibits making of a false statement of a material fact to the seller of a firearm. The courts below found that petitioner had falsely denied that he had been convicted of a predicate offense when he purchased the hunting weapons.

Petitioner's prior conviction, established in the court below by stipulation of the parties (A 153), was based upon a charge that he had brought into the United States a lady's bracelet watch worth $9,000 by means of a false or fraudulent customs declaration, in violation of 18 U.S.C. § 542. Punishments authorized for violations of § 542 are imprisonment for a term of two years or a fine of $5,000, or both. It was stipulated that petitioner had received a two-year suspended prison sentence, a $5,000 fine, and had been placed on probation for two years.

During the transaction in Allsports Sporting Store, as already mentioned, the salesman filled in part of the Firearm Transaction Record form required for each weapon. These forms, prepared by the Bureau of Alcohol, Tobacco and Firearms, an agency of the Treasury Department, contain a set of eight printed questions. One question is: "Have you been convicted in any court of a crime

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[4] The prosecution originally obtained a 13-count indictment (A 39). Before trial this was superseded by a three-count indictment (A 8-11). After the close of evidence, the trial court dismissed one count charging petitioner with conspiracy (A 218).

punishable by imprisonment for a term exceeding one year?" Next to that question on each form is written "no"; it was stipulated that a government handwriting expert having received samples of petitioner's handwriting, had no opinion as to the authorship of the "no" on those forms (A 192). It was further stipulated that petitioner had signed his name on the signature line of each of the forms (A 160).

On the basis of the Customs' offense, the jury found petitioner guilty of unlawfully receiving a firearm in violation of § 922(a)(6) (A 280-281). Defense motions for judgment of acquital and new trial were denied by the district court (A 371). The court held that the petitioner's Customs offense was a predicate offense under the Gun Control Act and, therefore, that the statements on the records forms were false in a material fact.

On the unlawful receipt county, the district court sentenced petitioner to imprisonment for a term of three months; on the false statement count, the trial court imposed three years probation to run consecutively with the prison term.[5] (A 383).

The Court of Appeals for the Second Circuit (Oakes, Van Graafeiland and Winter, C.JJ.) affirmed. The opinion of that court by Judge Van Graafeiland appears in Appendix A, *infra*, A-1 - A-7.

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[5] The district court delivered an oral opinion from the bench to explain his denial of the defense motions (App.C, *infra* A-11).

REASONS FOR GRANTING THE WRIT

I. Whether Non-Violent Trade Regulation Offenses, in This Instance a Customs Offense, Are Predicate Offenses For Purposes of the Gun Control Act, Is An Important Question of Federal Law Which Has Not Been, But Which Should Be Settled By This Court.

The Gun Control Act of 1968, 18 U.S.C. §§ 921-928, is a major statute that regulates numerous actions that involve firearms. Manufacture, importation, shipment, sale and receipt of firearms are controlled by a complex web of licensing requirements and prohibited activities. Fundamental to the structure of the Gun Control Act is the idea of prior criminal conviction or prosecution. Congress sought to exclude from manufacture, distribution and receipt of firearms persons who had committed or who were charged with committing crimes of violence.

The Gun Control Act contains a definition of predicate offenses that excludes trade related offenses. Congress concluded, rationally, that persons convicted of or charged with trade related offenses pose no threat to community peace. The first question presented in this case is the important issue of the scope of the exclusion for trade related offenses.

The critical language of the Act excludes from the category of predicate offenses –

> * * * any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary [of the Treasury] may by regulation designate * * * (921(a)(20)(A).

The language of exclusion was found in § 921(b)(3) of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351 (90th Cong., 2d Sess., June 19, 1968). When Title IV was amended in December of 1968 to become the Gun Control Act, the exclusion language was moved to § 921(a)(20)(A).

The meaning of this important provision of the Gun Control Act has not been considered in a decision of this Court. The Court has, however, taken note of the exclusion. In a case decided by this Court last Term, *Dickerson Inc., v. New Banner Institute*, 103 S. Ct. 986 (1983), Justice Blackmun, in the opinion of the Court, noted:

> The Act provides exemptions from its proscriptions for certain business and commercial crimes, such as antitrust violations * * * (*Id.* at 988 n. 1).

The Court in *Dickerson* had no occasion to construe § 921(a)(20)(A) because "these statutory exemptions are of no relevance here." *Ibid.*

The offense of which petitioner was convicted in 1978 is an offense "pertaining to antitrust violations, unfair trade practices, [and] restraints of trade." While the Customs laws of the United States have a minor revenue purpose,[6] their principal object is to regulate business practices of international trade. Nations engaging in international commerce have sophisticated regulatory systems to control the

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[6] Prior to World War I and the development of federal income taxes, customs receipts were a substantial part of the revenues of the United States Government. Today, however, the revenue purpose to Customs laws is minimal. In 1982, Customs duties were 1.4% of the Government's receipts. Treasury Bulletin, 1st Quarter Fiscal 1983, pp. 4-5. That has been the pattern for many years, since well before enactment of the Gun Control Act. *See U.S. Treasury Department, Annual Report 1979, Statistical Appendix, Table 2.*

flow of goods into their respective domestic economies. Customs duties are integral to the regulation of importation of goods. Duties are imposed to protect domestic producers of the same or similar goods from unfair competition by those who would import manufactured goods. The criminal code provision in 18 U.S.C. § 542, of which petitioner was convicted, is an important tool for enforcement of this regulatory scheme.[7] As the Annual Reports of the Treasury Department regularly observe, the mission of the Customs Service is "to protect American trade and commerce." *See U.S. Treasury, Annual Report* 1979, p. 201.

The conclusion that a § 542 offense is excluded from predicate offenses under the Gun Control Act is confirmed by ruling of the Treasury Department bureau charged with responsibility to implement the Act. Sears, Roebuck & Co. has been indicted for violating § 542. If this were a predicate offense under the Gun Control Act, Sears would be disabled from receipt or sale of firearms. The licensing provision of the Gun Control Act, § 923(d)(1)(B), uses the same predicate offense definition that is involved in petitioner's case. In a 1980 ruling on Sears' situation, the Bureau of Alcohol, Tobacco and Firearms (ATF) concluded that a § 542 offense pertains to Customs laws designed to protect domestic industry from unfair foreign competition and, therefore, is not a predicate offense under the Gun Control Act (A 293-294). ATF repeated its conclusion concerning exemption of § 542 offenses in another ruling issued in 1982 (A 295-297).

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[7] The court below did not disagree with this characterization of the *legislative purpose* of § 542. The court of appeals held that § 542 was not excluded as a predicate offense because it did not include effect on competition or injury to consumers as an element of the offense. Given that the overall design of the Customs laws and enforcement provisions is to regulate commerce, it is immaterial that the particular enforcement provision, in aid of Customs assessments, does not require proof of economic injury.

Interpretation of a federal statute by the agency charged with its administration should be given considerable respect. This Court has repeatedly declared that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. F.C.C.*,395 U.S. 367, 381 (1969); *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980); *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978); *Udall v. Tallman*, 380 U.S. 1 (1965).

Notwithstanding this established principle of judicial deference to administrative interpretation of statutes, the court of appeals below wholly ignored the significance of the ATF rulings. The opinion of that court makes no reference to them.

Petitioner's contention that a § 542 offense is not a predicate offense under the Gun Control Act is not only consistent with and confirmed by the rulings of ATF, but is reinforced by the general principles espoused by this Court for the interpretation of federal criminal statutes. A criminal statute is constitutionally invalid if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *United States v. Batchelder*, 442 U.S. 114, 123 (1979). *See also Kolender v. Lawson*, 103 S. Ct. 1855 (1983); *Dunn v. United States*, 442 U.S. 100, 112 (1979). When questions arise concerning the ambit of a criminal statute, resolving those questions in favor of lenity avoids collision with fundamental requirements of due process of law.[8] In the related principle of lenity as a maxim of statutory construction, this Court holds that where there is ambiguity in a criminal

[8] The constitution question is presented in this case if the Gun Control Act is interpreted to include Customs offenses under 18 U.S.C. § 542 as predicate offenses. See Point II of the Petition, *infra*.

statute, the ambiguity should be resolved in favor of a defendant. *United States v. Bass*, 404 U.S. 336 (1971); *Rewis v. United States*, 401 U.S. 808 (1971); *see also Scarborough v. United States*, 431 U.S. 563, 577 (1977); *Huddleston v. United States*, 415 U.S. 814, 830-831 (1974).

The ATF rulings demonstrate, at a very minimum, that persons of ordinary intelligence can read the Gun Control Act as excluding § 542 offenses from the category of predicate offenses. The exemption language excludes any and all Federal or State offenses "pertaining to" antitrust violations, unfair trade practices, and restraints of trade. ATF officials were sensitive to the leeways created by the "pertaining to" phrase in § 921(a)(20)(A). The courts below, however, ignored that language, which permits and requires a liberal reading of the statutory language. Congress' intent to have this language broadly construed is manifest in the power given to the Treasury Secretary to add additional offenses relating to regulation of business practices.[9]

How widely § 921(a)(20)(A) should be read ultimately is not an issue presented by this case. Certainly, as this Court said in *Dickerson*, the exemption could reach a body of "business and commercial crimes." For the immediate case, the issue presented is whether the exemption reaches Customs offenses prescribed by § 542. Decision of that issue by this Court will add significantly to the clarity of the Gun Control Act and to its further administration by lower courts and administrative agencies.

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[9] The Secretary of the Treasury has not acted pursuant to this authority.

This Court has already addressed another facet of the definition of predicate offenses under the Gun Control Act. In *Dickerson*, this Court decided that a conviction expunged under Iowa law was nonetheless a conviction for purposes of the Gun Control Act. *Dickerson v. New Banner Institute, Inc., supra.* The Court has also considered the definition of predicate offenses under the companion gun control provisions in Title VII of the Omnibus Crime Control and Safe Streets Acts, 18 U.S.C. App. §§ 1201-1203. *Lewis v. United States*, 445 U.S. 55 (1980).

Guidance by the Court on the scope of the exemption from the Gun Control Act for trade regulation offenses, as presented in this case, involves concerns that are broader and intrinsically more significant to implementation of the statute than were the issues presented in *Dickerson* and *Lewis*, both of which were held by this Court to merit review by writ of certiorari. It is respectfully submitted that this Court should grant the petition for certiorari.

II. The Gun Control Act as Applied to This Case Creates an Irrational Classification Between Non-Violent Trade Regulation Offense and Other Similar Non-Violent Offenses and Thus Poses an Important Question of Constitutional Law Which Has Not Been, But Which Should Be Settled By This Court.

If this Court finds, notwithstanding petitioner's first point, that a Customs offense under 18 U.S.C. § 542 is a predicate offense under the Gun Control Act, then that Act as applied in this case in unconstitutional. When a statute divides persons into classes and draws legal distinctions between the classes, the Constitution requires a rational explanation for the differential treatment. The Gun Control Act's classification of non-violent trade offenders, exempting one group and not the other, fails to meet this constitutional requirement.

Under the Gun Control Act, it is lawful for certain persons to receive firearms (and to engage in all other conduct regulated by the Act) even though they have been convicted of prior crimes. By virtue of § 921(a)(20)(A), persons who have committed offenses pertaining to antitrust violations, unfair trade practices, or restraints of trade are under no disability. The obvious rationale for this provision in a gun control act is that persons who have committed such trade related offense have shown no propensity for violence. But persons may have committed other trade offenses which equally lack any showing of propensity for violence. On the facts of this case, petitioner's only prior conviction was for making a false or fraudulent statement in connection with importion of goods into the United States. Nothing in the definition of that crime suggests that a violator poses any risk whatsoever of future violent behavior.

The Gun Control Act thus divides the broad category of non-violent trade offenses into two classes. In one class are trade regulation offenses, which are excluded as predicate offenses under the Gun Control Act. The remainder of the category of non-violent trade offenses, including specifically the Customs offenses proscribed by 18 U.S.C. § 542, are put into a second class, which is treated by the Gun Control Act in the same manner as all crimes of violence. This division of non-violent trade offenses into two classes, with such sharply divergent treatment, renders the Gun Control Act as applied in this case unconstitutional.

Implementing the Due Process Clause of the Fifth Amendment, this Court has held in many cases that, where a law creates classification schemes that discriminate between groups of people, there must be a ground of difference between the classes that explains the differential in treatment. *E.g. Carey v. Brown*, 447 U.S. 455 (1980); *Marshall v. United States*, 414 U.S. 417 (1974); *Grayned*

v. Rockford, 408 U.S. 92 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Several cases decided by this Court at the end of the last Term applied the requirement of a rational basis for discriminations between classes of persons. *Bearden v. Georgia*, 103 S. Ct. 2064 (1983); *Jones v. United States*, 103 S. Ct. 3043 (1983).[10]

The Gun Control Act has been considered by this Court in four previous cases, but none of those cases raised the constitutional question presented here. *See Huddleston v. United States*, 415 U.S. 814 (1974); *Barrett v. United States*, 423 U.S. 212 (1976); *United States v. Batchelder*, 442 U.S. 114 (1979); *Dickerson v. New Banner Institute, Inc.*, 103 S. Ct. 986 (1983). A quite different constitutional challenge was made to the Gun Control Act in *Batchelder*; the contention was founded on the overlap between the Gun Control Act and Title VII of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 1202.[11]

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[10] The constitutional principle applied in these cases is closely akin to the requirement, explicit in the Fourteenth Amendment, of equal protection of the laws. Recent opinions of this Court have indicated that the requirements of due process of law and equal protection of the laws tend to converge. *See, e.g. Bearden v. Georgia, supra; Jones v. United States, supra. And see Shapiro v. Thompson*, 394 U.S. 618 z)1969); *Schneider v. Rusk*, 377 U.S. 163)1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

[11] In the first case to come before this Court under 18 U.S.C. § 1202, an equal protection challenge was made to Title VII. Section 1202 is structured in a different way than the Gun Control Act. The constitutional challenge was therefore different from that presented here. This Court reversed the conviction in that case on the basis of construction of the statute, and the constitutional question was not reached. *United States v. Bass*, 404 U.S. 336 (1971).

Petitioner is unaware of any lower court case in which the constitutional question presented here was raised.[12] A district court took judicial notice that not all persons involved in crimes punishable by more than a year have violent propensities, but since the defendant in that case had been convicted of a crime of violence, the court's notice had no effect on its decision. *United States v. Friday*, 404 F. Supp. 1343, 1347-1348 (E.D. Mich. 1975). *See also United States v. Weingartner*, 485 F. Supp. 1167 (D.N.J.) aff'd mem., 642 F.2d 445(3d Cir. 1981).

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[12] A number of courts have held that the Gun Control Act is constitutional, rejecting claims of denial of equal protection of the laws, on the ground that the Act defines predicate offenses to include only "serious" crimes. *E.g., United States v. Giles*, 640 F.2d 621 (5th Cir. 1981). *See also United States v. Craven*, 478 F.2d 1329 (6th Cir.), cert. denied, 414 U.S. 866(1973); *United States v. Weatherford*, 471 F.2d 47 (7th Cir. 1972), cert. denied, 411 U.S. 972 (1973); *Cody v. United States*, 460 F.2d 34 (8th Cir.), cert. denied, 409 U.S. 1010 (1972). The offenses excluded as predicate offenses by § 921(a)(20)(A) cannot be classifed as "non-serious." Violations of the Sherman Act, for example, subject offenders to possible imprisonment for a term of three years and to a fine of up to $1 million. 15 U.S.C §§ 1,2. The classification of predicate offenses under the Gun Control Act cannot be rationally explained on the ground that Congress excluded "non-serious" crimes and included only "serious" offenses.

Even though the distinction between "serious" and "non-serious" crimes is patently invalid, it was the ground on which the district court upheld petitioner's conviction. The court said:

> In order to promote the [legislative] goal, Congress determined to prohibit the receipt of firearms by those who in the past have been convicted of serious crimes, whether violent or nonviolent in nature, to wit: felonies. This prohibition was clearly rational.

The court of appeals below cited *Giles* in its opinion, but did not overtly accept the view that the classification of predicate offenses is rational because it excludes only "non-serious" offenses.

The court of appeals below accepted the premise that the constitutionality of the Gun Control Act's classification of predicate offenses turns upon the likelihood that an offender would misuse a firearm. The court of appeals implicitly rejected the rationale of the district judge, who concluded that Congress had defined predicate offenses to be "serious" crimes.[13] The Second Circuit correctly noted that there are severe criminal sanctions for violations of the antitrust laws, citing 15 U.S.C. §§ 1 and 2. That court held nonetheless that

> * * * there is nothing irrational or illegal in Congress' belief that trade offenders would be less likely to misuse a gun than would other criminals such as forgers, drug peddlers, or receivers of stolen property (App., A-6).

The court of appeals compared trade offenses with wholly dissimilar crimes. Quite a different result follows if the comparison is with the offense of which petitioner had been convicted. It is both irrational and illogical to believe that violators of the Customs laws, particularly 18 U.S.C. § 542, would be more likely to misuse a gun than would trade offenders. If the comparison is made between trade offenses and *similar* non-violent crimes, the Gun Control Act as applied in this case is unconstitutional.

The constitutional question posed by the Gun Control Act's classification of predicate offenses is manifestly an important question of federal law which has not been, but which ought to be decided by this Court. It is respectfully submitted that the petition for a writ of certiorari should be granted.

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[13] See note 12 *supra*.

III. Whether Hunting Weapons are "Firearms" Under the Gun Control Act of 1968 Is An Important Question of Federal Law Which Has Not Been, But Which Should Be Settled by This Court.

Petitioner contends that ordinary hunting weapons were excluded by Congress from the scope of the Gun Control Act of 1968. Petitioner has been convicted for purchasing four hunting weapons, together with a hunting license, from an established and reputable sporting goods store. Buyer's identity was openly revealed to the seller, who properly made a record of the sales on Treasury Department forms signed by the buyer. This Court has noted that gun control laws are addressed to those who acquire guns surrepititiously. *Scarborough v. United States*, 431 U.S. 563, 576 (1977). There was nothing surreptitious or suspicious in the transaction between petitioner and Allsports Sporting Store. Petitioner contends that the Gun Control Act of 1968 does not make this kind of transaction into a federal crime.

Congressional intent to make special provision for hunting weapons is manifest on the face of the Gun Control Act. Hunting weapons are plainly exluded from the definition of "destructive device." § 921(a)(4). The function of "destructive device" is to define "firearm." Every "destructive device" is a "firearm." § 921(a)(3). Section 922, the section of the Act that defines unlawful acts, with minor exception, [14] applies to transaction in "firearms." The gist of petitioner's argument is that the special exclusion of hunting weapons in § 921(a)(4) carries through to narrow the definition of "firearm."

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[14] See §§ 922 (a)(4) and (b)(4).

This reading of the Act is confirmed by the legislative history. Several months prior to enacting the Gun Control Act in December 1968, Congress passed the Omnibus Crime Control and Safe Streets Act. Pub. L. 90-351, 90th Cong., 2d Sess. Title IV of the latter was the predecessor of the Gun Control Act. Title IV was essentially limited to regulation of handguns and weapons of war. Congress achieved this result by excluding long guns from the definition of "destructive device." § 921(b)(2)(C) and (D).[15] Title IV used "destructive device" as a sub-definition of "firearm" in the same way as the Gun Control Act. One of the reasons for replacing Title IV with the Gun Control Act was the view that the limitation to handguns in Title IV was too strict. When the Attorney General informed Congress that Justice Department supported enactment of the Gun Control Act he cited the extension of control to some long guns as reason for that support. 3 U.S. Cong. & Admin. News 4425 (1968).

This history is significant because both Title IV and the Gun Control Act define "firearm" independently of "destructive device." Both statutes define "firearm" to mean any "weapon (including a starter gun) which will . . . expel a projectile by the action of an explosive." Gun Control Act, § 921(a)(3)(A); Title IV § 921(a)(3). On a superficial reading, this definition could include all guns, short or long. This superficial reading of Title IV would have resulted in its provisions encompassing all long guns. The

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[15] Section 921(b)(2)(C) and (D) provided:

> (b) As used in this chapter – . . .
>
> (2) The term "destructive device" shall not include – . . .
>
> (C) any shotgun other than a short-barreled shotgun, or
>
> (D) any non automatic rifle (other than a short-barreled rifle) generally recognized or particularly suitable for use for the hunting of big game.

Justice Department's support of amending Title IV to add long guns would have made no sense. Plainly, given the history of Title IV, Congress narrowed the scope of its gun control legislation by excluding long guns from "destructive device" and, through that limitation, narrowed the meaning of "firearm," the key provision in the operative sections of the act. Congress followed exactly the same pattern in the Gun Control Act.

In replacing Title IV with the Gun Control Act, Congress did not bring all long guns into the scope of the Act. Congress excluded hunting weapons. The exclusion for hunting rifles appears in the last paragraph of § 921(a)(4);

> The term "destructive device" shall not include . . . any other device which . . . is a rifle which the owner intends to use solely for sporting . . . purposes.

With respect to hunting shotguns, the exclusionary language appears in § 921(a)(4)(B):

> The term "destructive device" means — . . . (B) any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes). . .

The record in this case shows that petitioner purchased two hunting riles and two hunting shotguns. At trial, petitioner sought to prove that he had acquired the hunting rifles for sporting purposes, but the evidence was excluded on objection by the government. At the end of the trial, the district judge stated:

> I have precluded [defense counsel] from putting in proof that they are sporting weapons . . . . I will tell you I believe they are and I will even add that . . . at least two of them

> may have cultural value. I have ruled that this is not an issue in this case, and it is not a question for the jury. It is a legal question which, after hearing from you, I have determined. That would leave you, in my judgment, with an appropriate appeal (A 180-181).

The district court also declared that petitioner's intention in purchasing the hunting weapons was irrelevant (A 365).[16] For purposes of appellate review, therefore, it is established that the four guns that petitioner purchased from Allsports Sporting Store were hunting weapons and that his intention was to use them for that purpose.

The government maintains that it is not sufficient that a court has found the weapons to be hunting weapons. The government argues that it is also necessary that the Secretary of the Treasury so find. With respect to shotguns, § 921(a)(4)(B) contemplates a finding by the Secretary, but it is inconceivable that the Secretary would disagree with the district judge in concluding that the two Browning 2000 shotguns, standard hunting weapons used throughout the country, were not "generally recognized as particularly suitable for sporting purposes." With respect to hunting rifles, the Gun Control Act contemplates no finding by the Secretary as to the nature of the weapons.

The government also argues that it is not sufficient that petitioner's innocent intention to use the hunting weapons for sporting purposes has been judicially established. The government contends that this finding must be made by

---

[16] To prove his intent in purchasing hunting weapons, petitioner attempted to prove that he simultaneously purchased a hunting license. On government objection, the court excluded this evidence (A 31-33, 37-38).

the Secretary of the Treasury. This argument is neither a plausible reading of the Act nor a reasonable interpretation of the legislative intent.[17]

Whether hunting weapons are excluded from the Gun Control Act of 1968 is an important question of federal law which has not been, but which should be settled by this Court. Resolution of this question would tend to clarify for prosecutors and lower courts a major distinction between the Gun Control Act and Title VII of the Omnibus Safe Streets and Crime Control Act. The definition of "firearm" in the latter plainly includes hunting weapons. Section 1202(c)(3) declares that "firearm" in that title "shall include any handgun, rifle or shotgun." The overlap between the two gun control laws has been legally troublesome. *See Batchelder v. United States*, 442 U.S. 114 (1979). Differences between the two laws can and should be drawn clearly.

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[17] The last clause of § 921(a)(4) has three branches:

> The term "destructive device" shall not include . . . any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

It is grammatically proper and functionally reasonable to have an administrative ruling on the first branch. A concept as open ended as a device "not likely to be used as a weapon" can be implemented well in an administrative proceeding. A wholly different situation exists in the second and third branches. The statute is amply clear for judicial application. With respect to antiques, there is a fully detailed definition in § 921(a)(16). The branch relevant to this case, turning upon the intent of the purchaser of a hunting rifle, is particularly suited for judicial fact-finding. It is incongruous to contemplate numerous administrative proceedings leading to rulings by the Treasury Secretary on the intentions of particular purchasers of hunting rifles. No such intent should be imputed to Congress. The government's argument that the third branch requires more than judicial fact-finding is a misreading of the Act.

None of the Gun Control Act cases previously considered by this Court involved hunting weapons. The weapon in *Batchelder* was a .38 caliber pistol.[18] The gun in *Barrett v. United States*, 423 U.S. 212 (1976), was a .32 caliber revolver. At issue in *Dickerson v. New Banner Institute, Inc.*, 103 S. Ct. 986 (1983) was the license of a gun dealer, who presumably handled all kinds of weapons. The only case under the Gun Control Act before this Court that involved long guns was *Huddleston v. United States*, 415 U.S. 814 (1974). There were three weapons: a 30-30 caliber rifle, a .22 caliber rifle, and a 7.62 caliber rifle. No point was made whether all of any of these were hunting weapons. The status of hunting weapons under the Gun Control Act is an open question, of obvious importance, which should be determined by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN
1325 Spruce Street
Philadelphia, Pa. 19107

Counsel for Petitioner

January 1984

[18] This appears in the court of appeals opinion, 581 F.2d 626, 628 (7th Cir. 1978).

APPENDIX

APPENDIX A
OPINION BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 187—August Term, 1983

(Argued September 20, 1983
Decided November 28, 1983)

Docket No. 83-1184

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL ANGELO MELDISH,

Defendant-Appellant.

Before:

OAKES, VAN GRAAFEILAND and WINTER,
Circuit Judges

Appeal from a judgment of the United States District Court for the Southern District of New York (Ward, J.) convicting Michael Meldish of illegally receiving firearms

and knowingly making a false statement during a firearms transaction.

Affirmed.

* * *

VAN GRAAFEILAND, *Circuit Judge:*

Following a jury trial before Judge Ward in the United States District Court for the Southern District of New York, appellant was convicted of violating 18 U.S.C. §§ 922(h) and 922(a)(6). Section 922(h)(1) makes it unlawful for one who has been convicted of a crime punishable by a term of imprisonment exceeding one year to receive a firearm that has moved in interstate commerce. Section 922(a)(6) provides in pertinent part that it is unlawful for the purchaser of a firearm from a licensed dealer knowingly to make a false written statement intended or likely to deceive the dealer with respect to any fact material to the lawfulness of the sale. Finding no error in

the proceedings below and concluding that the jury's verdict was supported by the evidence, we affirm.

The facts are largely undisputed. On July 12, 1978, appellant was convicted in the United States District Court for the Eastern District of Virginia of violating 18 U.S.C. § 542 by bringing a lady's wristwatch worth $9,000 into the United States by means of a false customs declaration. This was a felony punishable by imprisonment for up to two years or a fine up to $5,000, or both. Appellant received the maximum fine and a two-year suspended sentence with probation.

On October 8, 1982, appellant purchased two shotguns and two rifles from a dealer in Yonkers, New York. In order to effectuate that purchase, appellant was required to complete two copies of Treasury Form 4473, entitled "Firearms Transaction Record." *See* 27 C.F.R. § 178.124. An "important" notice on the Form advised appellant that the information and certification on the Form were designed so that the dealer could determine if he lawfully could sell appellant the guns. Appellant also was informed that an untruthful answer in his certification might subject him to criminal prosecution. Despite the foregoing, appellant certified that he never had been convicted of a crime punishable by imprisonment for a term exceeding one year.

The Unlawful Receiving Count

Although both the Gun Control Act of 1968, 18 U.S.C. §§ 921-928, and Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. App. § 1201-1203, prohibit convicted felons from receiving firearms, the two statutes do not define felonies in identical terms. *United States v. Batchelder*, 442 U.S. 114, 119 n.5 (1979).

The Gun Control Act excludes from the category of crimes punishable by imprisonment for a term exceeding one year under section 922(h)(1) "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate. . . ." 18 U.S.C. § 921(a)(20). Congress intended by this provision to exclude "offenses relating to antitrust violations and similar business offenses." Conference Rep. No. 1956, 90th Cong., 2d Sess. 29, *reprinted in* 1968 U.S. Code Cong. & Ad. News 4426, 4428. The Omnibus Crime Control and Safe Streets Act, on the other hand, defines a felony as "any offense punishable by imprisonment for a term exceeding one year. . . ." 18 U.S.C. App. § 1202(c)(2). The intendment of this Act was to permit a person to possess a gun until the commission of his first felony. Statement of Senator Long, as quoted in *United States v. Bass*, 404 U.S. 336, 355 (1971)(Blackmun, J., dissenting). Although the coverage of section 1202 is broader than that of section 922(h)(1), the Government chose to indict appellant under the latter section.

On the basis of stipulated facts, Judge Ward charged the jury that appellant's prior conviction was for a crime punishable by a term exceeding one year. Appellant contends that this was error, arguing that his falsification of the customs declaration for the $9,000 watch was an offense pertaining to an "unfair trade practice" within the meaning of section 922(a)(20). We disagree.

Although it is almost impossible to formulate an all-inclusive definition of "unfair trade practice," *see FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972), implicit in the term itself is the requirement that the practice adversely affect either competitors or consumers,

see id. at 241-44. Among the practices which may cause such an adverse effect are the suppression of competition, *Shakespeare Co. v. FTC*, 50 F.2d 758, 759-60 (6th Cir. 1931), price discrimination, *Oliver Bros., Inc. v. FTC*, 102 F.2d 763, 767 (4th Cir. 1939), deceptive advertising or labeling, *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 335-36 (1938), and the exploitations of child purchasers, *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 313 (1934).

Section 542 does not concern itself with matters such as these. To secure a conviction under section 542, the Government need prove only "(1) an attempt to introduce imported merchandise into the United States (2) 'by means of' any false statement or practice (3) without reasonable cause to believe the truth of such statement or practice." *United States v. Rose*, 570 F.2d 1358, 1363 (9th Cir. 1978). A violation of section 542 in no way depends upon whether it has an effect on competition or consumers.

Appellant's reliance upon legislation such as the Antidumping Act, current version at 19 U.S.C. §§ 1673-1677g, is misplaced. The Antidumping Act is designed to prevent foreign merchandise from being sold in the United States at less than its fair value so that it materially injures or threatens material injury to a domestic industry. 19 U.S.C. § 1673. Section 542 concerns itself only with whether a false statement was made to effect or attempt to effect the entry of the goods in question. *United States v. Teraoka*, 669 F.2d 577, 579 (9th Cir. 1982). There is nothing in the record of the instant case to justify calling appellant's crime an unfair trade practice.

We find no merit in appellant's contention that section 921(a)(20)'s exclusion of "unfair trade practices" from other nonviolent offenses punishable by imprisonment

for more than one year is an unconstitutionally irrational classification. Because the receiving and possessing of firearms is not a basic constitutional right, the classification must be upheld if it has any rational support. *See United States v. Giles,* 640 F.2d 621, 625-26 (5th Cir. 1981).

Unfair trade pratices found their origin in the common law of torts, and, even today, they usually are treated as civil offenses, *see, e.g.*, 15 U.S.C. § 45. Although some legislative bodies have seen fit to impose criminal sanctions for certain unfair trade practices, *see, e.g.*, 15 U.S.C. §§ 1 and 2, there is nothing irrational or illogical in Congress's belief that trade offenders would be less likely to misuse a gun than would other criminals such as forgers, drug peddlers, or receivers of stolen property. We must give deference to a "legislative determination that, in essence, predicts a potential for future criminal behavior." *Lewis v. United States*, 445 U.S. 55, 67 n.9 (1980).

We likewise find no merit in appellant's contention that, in enacting 18 U.S.C. § 921(a), Congress intended to regulate only "firearms", *see* § 921(a)(3), that conformed to the definition of "destructive devices", *see* § 921(a)(4), and that therefore he is entitled to claim the benefit of the sporting use exception contained in section 921(a)(4). Section 921(a)(3) offers several definitions of "firearm" and among those is "any destructive device." However, section 921(a)(3)'s definitions are in the alternative, and the first definition is "any weapon . . . which will . . . expel a projectile by the action of an explosive." The guns which appellant purchased fall squarely within this definition. In any event, it is the Secretary of the Treasury, not the gun purchaser, who determines in accordance with section 921(a)(4) whether a device is excluded from the definition of a destructive device. *See* 27 C.F.R. § 178.27.

The False Statement Conviction

Section 922(d)(1) of Title 18 prohibits a dealer from selling a firearm to one who he knows or has reasonable cause to believe has been convicted of a crime punishable by imprisonment for a term exceeding one year. Regulations of the Bureau of Alcohol, Tobacco and Firearms require that the dealer obtain and retain a Form 4473 containing the purchaser's certification that he is not prohibited by the Gun Control Act of 1968 or Title VII of the Omnibus Crime Control and Safe Streets Act from receiving a firearm in interstate or foreign commerce. 27 C.F.R. § 178.124. It was to make these restrictions on dealers effective that Congress enacted section 922(a)(6). *United States v. Allen,* 556 F.2d 720, 722 (4th Cir. 1977). The dealer cannot carry out his obligations without the cooperation of the purchaser, and the "essence of a § 922(a)(6) violation," therefore, is the purchaser's failure to tell the truth. *United States v. Edwards,* 568 F.2d 68, 70 (8th Cir. 1977); *sée Cassity v. United States,* 521 F.2d 1320, 1323 (6th Cir. 1975). We are satisfied that appellant's section 542 conviction precluded him under both the Gun Control Act and the Omnibus Control and Safe Streets Act from purchasing a firearm and that there was ample evidence to support the jury's finding that he falsely denied in his Form 4473 certification the fact that he had been convicted.

The judgment of conviction is affirmed.

APPENDIX B
JUDGMENT BELOW

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of November one thousand nine hundred and eighty-three.

Present:

HON: JAMES L. OAKES
HON: ELLSWORTH A. VAN GRAAFEILAND
HON: RALPH K. WINTER
Circuit Judges,

FILED: NOV 28, 1983

UNITED STATES OF AMERICA,

Appellee,

v.

83-1184

MICHAEL ANGELO MELDISH,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk

by Arthur Heller,
Deputy Clerk

APPENDIX C

BENCH OPINION OF DISTRICT COURT

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

MICHAEL ANGELO MELDISH,

Defendant.

The defendant Michael Angelo Meldish, has moved to set aside his conviction and for a new trial. Meldish argues that 18 USC, Sections 922(a) (6) and 922(h) (1) as applied to him are unconstitutional.

He also seeks a new trial on the grounds that the government's summation was improper and that it otherwise failed to adhere to the requirements of Brady v. Maryland, 373 US 83 (1963).

Further, he argues that this Court erred in refusing to admit into evidence certain evidence, specifically hunting licenses.

In his reply memorandum, Meldish argues that his prior conviction, under Title 18, United States Code, Section 542, for an unfair trade practice," which may not serve as a predicate offense for his instant conviction under the Gun Control Act of 1968.

Specifically, Meldish argues that on the basis of two informal advisory opinions by the Bureau of Alcohol, Tobacco and Firearms, no conviction under Section 542, regardless of the facts relating to the particular offense, can serve as a disabling felony under Title 18, United States Code, Sections 922(a) (6) and 922(h) (1).

For the reasons hereinafter stated, defendant's motion is in all respects denied.

Meldish first contends that the Gun Control Act of 1968 as applied to him is unconstitutional. Specifically, he claims that his convictions for violating 18 USC Sections 922(a) (6) and 922(h) (1) must be set aside since these sections create an irrational classification between "nonviolent trade regulation offenses and other similarly situated nonviolent offenses." (Defendant's memorandum of law at p. 4).

Meldish also claims that this Court improperly excluded evidence that he intended to use the firearms in this case for "sporting" purposes, because the Court incorrectly construed the relevant statute.

This Court rejects defendant's claims.

Defendant's contention that Section 921 (20) creates an irrational classification between non-violent trade regulation offenses and other similarly situated non-violent offenses, simply ignores the well-settled law to the contrary. United States v. Giles 640 F. 2d 621 (5th Cir. 1981); United States v. Weatherford, 471 F. 2d 47, 52 & n. 6 (7th Cir. 1972), cert. denied 411 U.S. 972 (1973); Cody v. United States, 460 F. 2d 34, 36n. 3 (8th Cir.), cert. denied 409 US 1010 (1972).

Meldish argues that "the governmental interest behind the Gun Control Act of 1968 was to combat crime by keeping guns out of the hands of dangerous individuals."

This is simply incorrect.

In Huddleston v. United States, 415 US 814 (1974), the Supreme Court noted the purpose of Congress in enacting Section 922(a) (6).

The Supreme Court indicated that Congress "was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest."

According to the Supreme Court, Congress determined that the ease with which firearms could be obtained contributed significantly to the prevalence of violent crime in the United States.

The Court noted that the principal purpose of the Federal Gun Control legislation was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."

See Senate report No. 1501, 90th Congress, Second Section, 22, 1968.

In order to promote the aforementioned goal, Congress determined to prohibit the receipt of firearms by those who in the past had been convicted of serious crimes, whether violent or nonviolent in nature, to wit; felonies. This prohibition was clearly rational.

Congress also rationally decided that "offenses pertaining to antitrust violations, unfair trade practices, restraints on trade, or other similar offenses relating to the regulation of business practices, as the Secretary [of the Treasury] may by regulation designate," did not contribute significantly to the prevalence of lawlessness and violent crime in the United States, a decision which cannot reasonably be disputed.

The Court has reviewed the legislative history of the statute and the cases which have interpreted the statute and has found nothing to support the arguments advanced by the defendant.

Accordingly, the Court rejects defendant's first argument.

Meldish seeks a judgment of acquittal on the grounds that the two shotguns and two rifles, which are the subject of his conviction, on Counts 2 and 4, are not covered by the Gun Control Act of 1968. Specifically, he asserts that this Court abused its discretion by excluding evidence that he intended to use his guns for noncriminal purposes, to wit: for hunting.

The Court concludes that this claim is based on an incorrect reading of the plain language of the statute.

Meldish was charged in Counts 2 and 4 with falsely acquiring and thereafter possessing firearms, to wit: two rifles and two shotguns.

The term "firearm" is clearly defined in Section 921(a) (3) (A), as "Any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive...or (D) any destructive device."

Meldish' claim that a rifle or a shotgun is anything but a firearm as defined in Section 921(a) (3) (A), is simply incorrect.

This Court notes that the defendant was neither charged nor convicted of acquiring or possessing "any destructive device." His construction of that term in his motion and his attempt to relate that term back to Section 921(a) (3) (A) must be rejected.

With regard to whether the shotguns and rifles involved in this case are covered by the term "destructive device." This Court's research appears to coincide in general with the results of both counsels' research, namely, neither the Court, the government, nor defendant's counsel have found any regulation in which the Secretary of the Treasury has determined or indicated in any way that weapons of the type involved in this case are to be excluded from the Gun Control Act's coverage of "destructive devices."

Accordingly, the Court did not commit error in refusing to admit evidence regarding any purported reason for the defendant's having purchased the weapons in question in this case. Such evidence was clearly irrelevant, since the shotguns and rifles, regardless of their intended function, are clearly covered by the Gun Control Act of 1968.

This Court was well within its discretion in precluding collateral evidence of Meldish' purchase of the hunting license.

Additionally, the Court found this evidence to be confusing and misleading. Thus, even if relevant, the evidence was properly excluded under Rule 403 of the Federal Rules of Evidence.

* * *

In his reply memorandum of law and in his supplemental reply memorandum of law, Meldish argues that his conviction in the Eastern District of Virginia for violating 18 USC Section 542, may not serve as a predicate offense for the instant prosecution under the Gun Control Act of 1968.

The Court has reviewed the Virginia indictment and finds that the indictment charges, in pertinent part, that Meldish "wilfully and knowingly" introduced "into the

commerce of the United States imported merchandise, that is a Vacheron Constantine ladies bracelet watch... by means of a false Customs declaration and a false statement which falsely and fraudulently certified and stated that Michael Angelo Meldish had declared all articles acquired abroad, whereas, in truth and in fact, as he then well knew, Michael Angelo Meldish did have on his person the above described...watch of an approximate domestic value of $9000, which he had obtained abroad and which he had not declared."

The crime charged, is a violation of Title 18 United States Code, Section 542 and carries with it a penalty of imprisonment for a maximum term of two years.

This Court concludes that Meldish's prior conviction under Title 18 United States Code, Section 542, is a predicate offense for the instant conviction.

The Court concludes that the conviction was for neither an unfair trade practice nor an offense relating to the regulation of business practices which would have removed the conviction from being a predicate "crime punishable by imprisonment for a term exceeding one year."

Meldish relies heavily on two advisory opinions furnished in another case by the Bureau of Alcohol, Tobacco and Firearms. Although a literal reading of these advisory opinions might support the argument presented by Meldish, the Court views these opinions as relating directly to the fact pattern of the case with which they were concerned.

The Court notes that these advisory opinions emphasize the case with which they are concerned involved "antidumping."

The Court has determined that Meldish' conviction in the Eastern District of Virginia did not involve "anti-dumping" and that the advisory opinions are inapposite.

Accordingly, the Court concludes that defendant's prior conviction under 18 USC Section 542, is a predicate offense for his instant conviction under the Gun Control Act of 1968.

Defendant's motion is, in all respects, denied.

It is so ordered.

Judge Robert Ward

APPENDIX D
RELEVANT SECTIONS
THE GUN CONTROL ACT OF 1968
CHAPTER 27, CUSTOMS U.S. CRIMINAL CODE

The Gun Control Act of 1968, 18 U.S.C. §§ 921-928.

18 U.S.C. § 921. Definitions

(a) As used in this chapter –

* * *

(3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

(4) The term "destructive device" means –

(A) any explosive, incendiary, or poison gas –

(i) bomb,

(ii) grenade,

(iii) rocket having a propellant charge of more than four ounces,

(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,

(v) mine, or

(vi) device similar to any of the devices described in the preceding clauses;

(B) any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter, and

(C) any combination of parts either designed or intended for use on converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, 4686 or title 10; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

(5) The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

* * *

(7) The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

* * *

(16) The term "antique firearm" means—

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; and

(B) any replica of any firearm described in subparagraph (A) if such replica—

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States

* * *

(20) The term "crime punishable by imprisonment for a term exceeding one year" shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

18 U.S. § 922. Unlawful acts

(a) It shall be unlawful—

* * *

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

* * *

(h) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * *

18 U.S.C. § 924. Penalties

(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

APPENDIX D (Continued)

Chapter 27, Customs, U.S. Criminal Code, 18 U.S.C. §§ 541-552

18 U.S.C. § 542. Entry of goods by means of false statements

Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter thereto without reasonable cause to believe the truth of such statement, whether or nor the United States shall or may be deprived of any lawful duties; or

Whoever is guilty of any willful act of omission whereby the United States shall or may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission—

Shall be fined for each offense not more than $5,000 or imprisoned not more than two years, or both

No. 83-1181

In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL ANGELO MELDISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a prior conviction for smuggling a watch into the United States without paying the lawful duty is a "Federal * * * offense[] pertaining to antitrust violations, unfair trade practices, [or] restraints of trade" (18 U.S.C. 921(a)(20)), which would not constitute a predicate felony offense under the Gun Control Act of 1968.

2. Whether the statutory distinction in the Gun Control Act of 1968 between antitrust or trade violations and other non-violent offenses is constitutional.

3. Whether the shotguns and rifles purchased by petitioner are "firearms" within the meaning of 18 U.S.C. 921(a)(3).

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1181

MICHAEL ANGELO MELDISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 722 F.2d 26. The opinion of the district court (Pet. App. A11-A17) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A9) was entered on November 28, 1983. The petition for a writ of certiorari was filed on January 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York,

petitioner was convicted of willfully and knowingly making false and fictitious statements intended and likely to deceive a firearms dealer, in violation of 18 U.S. 922(a)(6) (Count One), and unlawful receipt and possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(h) (Count Two). Pet. App. A2, A11. He was sentenced to three months' imprisonment on the first count, to be followed by a three-year term of probation on the other.[1]

The evidence adduced below, which is generally not in dispute (Pet. 2), showed that petitioner had been convicted of making a false customs declaration in connection with bringing into the United States a lady's wristwatch worth $9,000, a felony offense in violation of 18 U.S.C. 542. Petitioner received the maximum fine and a two-year suspended sentence with probation. Four years later petitioner purchased two shotguns and two rifles from a dealer in New York. At the time of purchase, petitioner certified on Treasury Form 4473 that he had never been convicted of a crime punishable by imprisonment for more than one year. Pet. App. A3.

ARGUMENT

Petitioner contends (Pet. 6-11) that his prior conviction does not constitute a predicate offense under the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.* Alternatively, he argues (Pet. 11-15) that if the statute applies to prior customs offenses it is unconstitutional because it creates an irrational distinction among various types of non-violent criminal convictions. Finally, he asserts (Pet. 16-21) that the rifles

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[1] The government dismissed one count, charging conspiracy, before the case was submitted to the jury.

he purchased are not "firearms" within the meaning of the Gun Control Act. The courts below correctly rejected these claims. Pet. App. A4-A6, A12-A17.

1. The Gun Control Act of 1968 prohibits a previously convicted felon from receiving a firearm (18 U.S.C. 922(h)). The statute, however, excepts certain felonies from the category of predicate offenses. Persons convicted of "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar practices relating to the regulation of business practices as the Secretary may by regulation designate," are not subject to the firearms and ammunition disabilities imposed by the Gun Control Act (18 U.S.C. 921(a)(20)(A)).

Prior customs convictions are not exempted under the plain language of the statute. Nonetheless, petitioner contends that his prior customs offense pertains to the regulation of "business practices of international trade" (Pet. 7), and that the customs laws were designed solely to protect domestic goods from unfair foreign competition (*id.* at 8). Accordingly, he argues, his prior conviction falls within the statutory exclusion of offenses pertaining to "unfair trade practices" (18 U.S.C. 921(a)(20)(A)).[2]

The court of appeals, in a well-reasoned analysis, explained that "unfair trade practices" include only

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[2] Since the Secretary of the Treasury has not designated any offenses as being "similar" to the "regulation of business practices" (18 U.S.C. 921(a)(20)(A)), petitioner concedes that his customs conviction cannot fall within that category (Pet. 10 n.9). Petitioner also recognized below that his customs conviction did not involve an antitrust violation or restraint of trade; he agreed that his offense had to pertain to "unfair trade practices" to fall within the exemption (Defendant's Reply Memorandum of Law 2, 4, 6, 7).

those activities that "adversely affect either competitors or consumers" (Pet. App. A4). See also *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 241-244 (1972); *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357 (1965). Petitioner was convicted of making a false customs declaration in connection with his attempt to smuggle a $9,000 watch into the United States. 18 U.S.C. 542. That conviction did not require proof of an adverse effect on competition or consumers (Pet. App. A5).[3] *United States* v. *Rose*, 570 F.2d 1358, 1363 (9th Cir. 1978). Thus, petitioner's violation of 18 U.S.C. 542 does not fall within the category of excepted "unfair trade practice" offenses. Indeed, the essential character of petitioner's prior offense more closely resembles tax evasion or false statement offenses, which clearly subject the offender to firearms disabilities, than it does an "unfair trade practice" offense.

Petitioner contends, however, that the court of appeals' construction of 18 U.S.C. 921(a)(20)(A) is erroneous because the Bureau of Alcohol, Tobacco and Firearms (ATF) does not regard customs violations as predicate offenses for purposes of the Gun Control Act. According to petitioner (Pet. 9-10), that view was expressed by the ATF in "two informal advisory opinions" (C.A. App. 371) in connection with an indictment against Sears, Roebuck & Co. But, as the court of appeals noted (Pet. App. A5), petitioner can draw little support from this quarter.

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[3] 18 U.S.C. 542 proscribes the introduction "into the commerce of the United States [of] any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal."

Sears was charged in 1978 with making false customs declarations in the importation of Japanese television sets. See 19 U.S.C. 160 *et seq.* (Antidumping Act of 1921).[4] As a result of that indictment, the question arose whether Sears could, if convicted, obtain licenses at new locations to sell firearms. The ATF concluded in a 1980 advisory opinion to Sears that "[t]he circumstances which led to [the company's] indictment under section 542 * * * are such that the indictments are for Federal offenses which 'pertain to' unfair trade practices within the meaning of section 921(a)(20)" (C.A. App. 293). In a 1982 letter ATF restated its narrow view that antidumping violations were within the category of exempted offenses "directed at insuring the existence of a competitive marketplace" (C.A. App. 296).

The failure of a United States citizen properly to declare property in his possession at a customs checkpoint can hardly be equated with violation of antidumping statutes. As the court of appeals properly noted, the antidumping provisions at issue in the Sears litigation were "designed to prevent foreign merchandise from being sold in the United States at less than its fair value so that it materially injures or threatens material injury to a domestic industry" (Pet. App. A5). The crime for which petitioner was convicted plainly does not have a similar focus. As petitioner acknowledges (Pet. 7 n.6), customs dec-

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[4] The 1978 indictment alleged, among other things, that Sears had received over $1.1 million in illegal rebates from a Japanese television manufacturer. On January 17, 1984, a superseding indictment was returned against Sears, and the government has moved to dismiss the original indictment.

larations are required of foreign travelers in order to collect the import duties due on goods brought into the United States. Petitioner's reliance on an analogy to an antidumping violation, therefore, "is misplaced" (Pet. App. A5).[5]

Equally insubstantial is petitioner's argument (Pet. 9-10) that the rule of lenity requires resolution of the issue in his favor. The rule of lenity " 'comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.' " *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 13 (quoting *Callanan* v. *United States*, 364 U.S. 587, 596 (1961)). Here, there is no ambiguity in the statute, and customs offenses relating to single items smuggled into the country by individuals have no apparent nexus to restraint of trade or other unfair trade practices.

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[5] In any event, petitioner's suggestion that ATF's interpretation of 18 U.S.C. 921(a)(20)(A) accords with his own is unsubstantiated. ATF has advised the Department of Justice that its opinion in the Sears case was based upon the particular facts of that litigation, that the circumstances of the present case do not lend themselves to a similar interpretation, that in the agency's view petitioner's prior offense was a disabling predicate offense under the Gun Control Act, and that the agency's position in the Sears case itself is being reconsidered (May 13, 1983 Affidavit of Louis J. Freeh 3). Cf. *United States* v. *Matteo*, 718 F.2d 340, 342 (2d Cir. 1983) ("The opinion of one Attorney General [in another case] by its words is limited to the very specific circumstances considered therein and we do not regard it as particularly enlightening with respect to the circumstances presented in the instant case").

Accordingly, there is no basis for application of the rule of lenity.[6]

2. Petitioner also contends (Pet. 11-15) that there is no rational basis for a distinction between offenses pertaining to unfair trade practices and other business related crimes. He therefore argues that disparate treatment of the two similar categories is unconstitutional. This claim is predicated upon petitioner's assumption that "[t]he obvious rationale for [the exception for antitrust violations, unfair trade practices, or restraints of trade] in a gun control act is that persons who have committed such trade related offense[s] have shown no propensity for viocence" (Pet. 12). Petitioner's "rationale" for the lines drawn by Congress in the Gun Control Act, however, is simply unsupportable.

Congress's intent in enacting the Gun Control Act of 1968 was not nearly as limited as petitioner suggests. "The principal purpose of the federal gun control legislation * * * was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'" *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974) (quoting S. Rep. 1501, 90th

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[6] Petitioner's assertion (Pet. 11) that the first question presented "involves concerns that are broader and intrinsically more significant to implementation of the [Gun Control Act]" than earlier decisions of the Court dealing with that statute is greatly overstated. As the court of appeals recognized (Pet. App. A4), even were petitioner correct in his interpretation of 18 U.S.C. 921(a)(20), the government could indict him under the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, which contains no exemption for trade-related felonies. 18 U.S.C. App. 1202(c)(2). Thus, review by this Court of the first issue presented by petitioner would have negligible practical import.

Cong., 2d Sess. 22 (1968)). See also *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 15; *Lewis* v. *United States*, 445 U.S. 55, 63 (1980); *Scarborough* v. *United States*, 431 U.S. 563, 572 (1977); *Barrett* v. *United States*, 423 U.S. 212, 220-221 (1976). To that end, "Congress obviously determined that firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them." *New Banner Institute*, slip op. 15. Congress could have more narrowly defined the class of "presumptively risky people" (slip op. 9 n.6) but chose not to. In fact, in 1968 Congress expanded the coverage of the earlier firearms statute (see Federal Firearms Act, ch. 850, 52 Stat. 1250 *et seq.*), which limited the statutory disability to those persons convicted of "a crime of violence" (§ 2, 52 Stat. 1251). In so doing, Congress signaled its intent to respond to lawlessness generally—not just crimes of violence. Thus, the courts below properly rejected petitioner's argument, concluding instead that Congress did not distinguish or intend a distinction between violent and non-violent crimes (Pet. App. A12-A13).[7]

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[7] In any event, petitioner's assertion (Pet. 12) that he committed a "non-violent trade offense[]" indistinguishable from the types of trade and antitrust violations exempted in the firearms statute is unfounded. Petitioner did not seek to contravene federal trade, antitrust, or antidumping laws; rather, his conduct was a species of criminal tax fraud—he attempted to smuggle a $9,000 ladies wristwatch without declaring and paying a duty on it. When threatened with a full body search, petitioner finally produced the watch but even then, in an effort to avoid paying the full duty, understated the cost of the watch by 33% (Government's Sentencing Memorandum 18). Thus, petitioner's furtive smuggling attempt, directed at depriving the government of its lawful customs revenue, shares no iden-

The Gun Control Act, moreover, is not unconstitutional because it applies to individuals with no predictable propensity for violence or unlawfulness (Pet. 15). The constitutional question " 'is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute.' " *Mathews* v. *DeCastro*, 429 U.S. 181, 189 (1976) (quoting *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975)). The classification in the Gun Control Act that is attacked by petitioner meets the standard of rationality. The court below thus correctly gave "deference to a 'legislative determination that, in essence, predicts a potential for future criminal behavior.' *Lewis v. United States*, 445 U.S. 55, 67 n.9 (1980)." Pet. App. A6.[8]

3. Finally, petitioner contends that the two rifles and two shotguns he purchased were hunting weapons and were intended to be used for that purpose (Pet. 16-21). Accordingly, he argues that they are not

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tity with trade offenses relating to commercial goods and the economic equilibrium of the marketplace. Indeed, petitioner's offense was not commercial or business-related in any way. Consequently, the statutory distinction between petitioner's criminal offense and business-related offenses that trace their recent origins to tort law is not irrational. See Pet. App. A6 ("[u]nfair trade practices found their origin in the common law of torts, and, even today, they are usually treated as civil offenses").

[8] Congress has also enabled convicted persons who allege no propensity for future criminality to seek exemptions under 18 U.S.C. 925(c). "The opportunity to obtain exemption under § 925(c) makes the prohibitory scheme * * * not merely rational, but fair as well." *United States* v. *Giles*, 640 F.2d 621, 627 n.9 (5th Cir. 1981).

regulated firearms under the statute.[9] This contention is frivolous. As the court below held (Pet. App. A6), shotguns and rifles fall squarely within the definition of weapons embraced by the statute.

The Gun Control Act defines a firearm as "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. 921(a)(3)(A). Thus, any of the particular weapons involved here may be exempted only if "the Secretary of the Treasury finds [that it] is not likely to be used as a weapon, is an antique, or is a rifle which the

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[9] Petitioner claims (Pet. 18-19) that he was foreclosed from proving at trial that the weapons were intended to be used for sport; consequently "[f]or purposes of appellate review * * * it is established that the four guns that petitioner purchased from Allsports Sporting Store were hunting weapons and that his intention was to use them for that purpose." The record supports no such presumption. In fact, petitioner has been charged with using the weapons to assault and threaten other persons, in a pending two-count indictment. See *New York* v. *Meldish*, No. 88/1982 (Putnam County Ct.). Count One, charging first degree assault, and Count Two, charging reckless endangerment, both allege that petitioner used his "hunting" shotgun first as a club to beat someone with and then as a firearm which he shot in the direction of others to threaten and intimidate them. Another state indictment charged petitioner and others with assault and specifies that the weapons used included two Browning 12 gauge shotguns (like the ones purchased by petitioner (Pet. 3)) and a Winchester rifle. At petitioner's firearms trial the government objected to petitioner's attempt to establish his intent to use the guns for sport and announced that to rebut and impeach petitioner's evidence it would prove the actual use petitioner made of the weapons (Tr. 80-86). The court then excluded petitioner's evidence (*ibid.*). Under these circumstances, the court's actions do not support petitioner's assertion that the weapons were intended for a sporting use.

owner intends to use solely for sporting, recreational or cultural purposes." 18 U.S.C. 921(4). The Secretary made no such finding with respect to the firearms purchased by petitioner. Moreover, the legislative history lends strong support to the proposition that Congress did not intend a blanket exception for rifles intended by the owner for sporting use. The House report notes that "[h]andguns, rifles, and shotguns have been the chosen means to execute three-quarters of a million people in the United States since 1900." H.R. Rep. 1577, 90th Cong., 2d Sess. 7 (1968). It is thus inconceivable that Congress (which, as noted, specified an exception for a limited class of rifles) intended to exclude rifles and shotguns from the class of regulated firearms. The courts below were correct in rejecting that contention (Pet. App. A6, A14-A15).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
SARA CRISCITELLI
Attorney

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No. 83-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL ANGELO MELDISH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

JACOB KOSSMAN
1325 Spruce Street
Philadelphia, Pennsylvania 19107
(215) 735-5084

Counsel for Petitioner

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IN THE

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PETITIONER'S REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

Factual misstatements, inclusion of irrelevant prejudicial materials, and legal distortions in the United States Brief in Opposition necessitate this brief reply on behalf of petitioner.

1. The first issue in this case is the effect under the Gun Control Act of 1968 of convictions for violation of 18 U.S.C. §542, the provision in the Customs chapter of the Federal Criminal Code which proscribes false statements

in connection with the importation of goods into the United States. Petitioner contends that such offenses are not predicate offenses under the Gun Control Act and, therefore, petitioner committed no crime when he purchased hunting weapons.

The government's primary response in its Brief in Opposition argues *smuggling* is a predicate offense under the Gun Control Act and that petitioner had been convicted of *smuggling*. The Question Presented, as phrased by the government, is "whether a prior conviction for *smuggling* a watch into the United States ..." is a predicate offense (Br. in Opp. i)(emphasis supplied). Repeatedly in its brief, the government refers to smuggling and smuggled goods. Describing petitioner's prior offense, the government declared that petitioner had "attempted to smuggle a $9,000 ladies wrist watch..."(Br. in Opp. 8 n. 7). The government asserts that petitioner's "furtive smuggling attempt" failed: "when threatened with a full body search, petitioner finally produced the watch..." (*Ibid.*).

As the government is well aware, petitioner has never been convicted of the offense of smuggling or attempting to smuggle goods into the United States. Smuggling as an offense is defined by 18 U.S.C. §545. Petitioner has no prior conviction for violation of § 545. Petitioner's sole previous conviction is for violation of an entirely different offense. The mischaracterization of the legal record is a blatant attempt by the government to prejudice petitioner in the eyes of this Court.

Not content with legal distortion, the government fabricates a factual scenario of petitioner's furtive smuggling attempt being foiled by imminent threat of a full body search. This can only be characterized as a vicious lie. As support for its calumny, the government does not

cite the record in this case, because there is nothing in the record of this case to support that statement.[1] The government does not cite the record in petitioner's prior prosecution, because there is nothing in the record of that case to support the government's lie. Indeed, the record in that case refutes the government's prejudicial misrepresentations.[2] The only source cited by the government for its factual assertions is "Government's Sentencing Memorandum 18" (*Ibid.*), a document containing matters not tested for accuracy by trial.

Adding to its legal distortion and factual misrepresentations, the government crudely misstates petitioner's arguement in this Court. Petitioner contends that the main purpose of the Customs laws is to regulate international trade and that Customs duties are imposed to protect manufacturers from unfair or destructive competition by importers of foreign made goods. (Pet. 7-8). Section 542 is part of that regulatory pattern. Therefore, petitioner

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[1] The record in the present case shows, by stipulation of the parties, that petitioner had been convicted in 1978 of making a false or fraudulent Customs declaration in violation of 18 U.S.C. § 542 (A 153).

[2] Prior to petitioner's trial on the Customs offense charge, a motion to suppress evidence seized by the Customs agents was heard on January 27, 1978 in the United States District Court for the Eastern District of Virginia, sitting in Alexandria, Virginia. (Criminal No. 77-364-A). The Customs agent testified that he had asked petitioner whether there was anything else that he wanted to declare and, immediately, petitioner took the wristwatch from his pocket and said that he had forgotten to list it. The district court denied the pretrial suppression motion on the ground *inter alia* that petitioner had voluntarily produced the watch.

argues that his prior conviction is an offense "pertaining to antitrust violations, unfair trade practices, [and] restraints of trade," the language in the exemption provision of the Gun Control Act. The government misstates petitioner's argument to be that "the customs laws were designed *solely* to protect domestic goods from unfair foreign competition" (Br. in Opp. 3)(emphasis supplied).[3] By so doing, the government no doubt hopes to deny petitioner's position credibility in this Court.

The gist of the government's argument is that Customs laws, and particularly § 542, have *no* function in protecting domestic goods from unfair foreign competition. The government observes that conviction of a violation of § 542 does not require proof of any adverse effect on competition or consumers. In the government's view, this is conclusive evidence that Congress, in designing the Customs laws, had no concern about the effect of imported goods on marketing of products manufactured in this country. This is arrogant nonsense. The legislative purpose of the Customs laws as a device to regulate international trade is indisputable. What matters is not the element of the offense Congress created to aid in enforcement of the Customs laws, but the manifest purpose that comprehends those laws as means of trade regulation.

The government's argument is contradicted by the position of the Treasury Department with respect to the indictment of Sears, Roebuck & Company, a position that

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[3] Compare the Petition for Certiorari: "While the Customs laws of the United State have a minor revenue purpose, their principal object is to regulate business practices of international trade" (Pet. 7). A footnote to this sentence describes the minimal revenues obtained from the Customs laws.

the government does not disavow in this Court. Sears and petitioner were both charged with making a false or fraudulent statement in connection with the importation of goods. The charges in both cases were laid under 18 U.S.C. § 542. The Treasury Department's Bureau of Alcohol, Tobacco and Firearms ruled that Sears' violation of § 542 is not a predicate offense under the Gun Control Act. Sears continues to be licensed to receive and sell firearms.[4] The Sears case demonstrates conclusively that a violation of the Customs offense set forth in 18 U.S.C. 542 is exempted from the scope of predicate offenses under the Gun Control Act.

Forced to concede that Sears § 542 offense is not a predicate offense under the Gun Control Act, the government argues that the exemption of Sears turns upon particular facts of that case, facts not present in petitioner's case. Sears, it appears, was importing television sets whose value was falsely represented for Customs purposes by concealing $1.1 million in illegal rebates from the Japanese manufacturer (Br. in Opp. 5 n 4). The sheer volume of goods involved in this charge is enough to show injury to domestic commerce. The charge against petitioner involved only one watch and therefore, contends the government, the particular facts of petitioner's petty offense do not meet

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[4] The government asserts that the ATF position in the Sears case is being reconsidered (Br. in Opp. 6 n. 5). The only basis for this assertion is an affidavit of the prosecutor, not in the Sears case, but in the case against petitioner. That affidavit, made ten months ago, referred to no one in ATF with authority to make any change in the Bureau's position. Nothing has happened in the period of almost a year since the prosecutor prepared his affidavit to indicate that ATF is giving any thought to changing its position in the Sears matter.

For the convenience of this Court, a copy of the ATF ruling, exempting Sears from any disabilities under the Gun Control Act and the Bureau's subsequent reiteration of that view is reproduced (A-293-297) as an appendix to this reply brief (Appendix A-1-A-5, *infra*).

the grander dimensions of the charges against Sears. On this supposed factual distinction, the government argues that the two cases should have different outcomes. Sears should receive no sanction whatsoever for violating the Gun Control Act, while petitioner should serve three months in prison, followed by probation.

The "particular fact" argument advanced by the government does not comport with the exemption provision of the Gun Control Act. That Act exempts *offenses*, not on the basis of special facts about particular offenders, but on the basis of the legislative purpose of the statutes in question. Congress designed § 542 to aid in the enforcement of Customs laws by making false Customs statements a crime. Customs laws are mainly trade regulation provisions. The Sears case is an indistinguishable precedent that a § 542 violation, being part of the enforcement of a system to prevent unfair competition, is exempt from the category of predicate offenses under the Gun Control Act.

Petitioner reiterates that the scope of the exemption provision of the Gun Control Act is an important federal question which has not been but which should be resolved by this Court.

2. The second issue in this case arises under the Constitution. If petitioner's § 542 offense is held to be a predicate offense under the Gun Control Act, then the Act is unconstitutional. The unconstitutionality follows from irrational classification of non-violent trade regulation offenses and other similar non-violent offenses.

The government wholly fails to address the question presented. The government argues that Congress could rationally include non-violent crimes as predicate offenses under the Gun Control Act, a position that no one would

controvert. However, Congress did not elect to include all non-violent crimes as predicate offenses and, indeed, Congress did not elect to include all non-violent serious crimes. Congress chose rather to create a classification scheme for non-violent crimes that exempted a substantial number of non-violent and serious crimes, which this Court described as "business and commercial crimes." *Dickerson, Inc. v. New Banner Institute*, 103 S. Ct. 986, 988 n. 1). Having chosen that statutory scheme, Congress must have a rational basis for the classification. The government does not provide a single suggestion of what such a rational basis might be.[5]

3. The third issue in this case is whether hunting weapons are "firearms" under the Gun Control Act. Petitioner contends that the Gun Control Act, read as a whole, plainly evidences a legislative intent to exclude long guns that are intended for sporting use.

For the first time in this case, the government finally recognizes that the Act's definitions of "firearm" and "destructive device" are so related that a weapon excluded from "destructive device" would also be excluded from "firearm " (Br. in Opp. 10-11). This is a startling change in the government's position. In both courts below, the government argued that the exceptions to the definition of "destructive device" did not apply to the apparently separate definition of "firearm," for which the Act had no

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[5] Part of the government's gross misrepresentation of the facts of petitioner's previous conviction is brought to bear in this argument to support the proposition that petitioner had tried to smuggle a watch past Customs agents who prevented that attempt from succeeding by confrontation in which petitioner was threatened with a full body search (Br. in Opp. 8 n. 7). The implication is that petitioner's prior offense was not "non-violent" in nature. The prejudicial falsity of these factual assertions were dealt with earlier in this reply brief.

exceptions. The concession that the two provisions are interrelated, despite its lateness in coming, requires reversal of the conviction.

The government masks the effect of its belated awakening by contending that the weapons purchased by petitioner were not excepted from "destructive device" because petitioner has been charged, in a New York state proceeding, with using the weapons to assault and threaten other persons (Br. in Opp. 10 n. 9). These assault charges, argues the government, show that petitioner did not purchase the weapons for sporting purposes. But see (Pet. 18-19).

Once again the government, going outside the record, has grossly misrepresented the true facts. The incident that led to the assault charge occurred almost a month *after* petitioner had purchased the hunting weapons, and there is no basis for relating back anything which took place in that incident to petitioner's purpose in purchasing hunting weapons. Petitioner and others have already been tried on an assault charge arising from that incident and have been acquitted by the trial judge in November, 1983, who held that the prosecution's evidence was insufficient to go to the jury. The government, omitting reference to this acquittal, stated that there is a pending two-count indictment against petitioner outstanding in Putnam County, New York. On January 6, 1984, the Appellate Division of the Supreme Court of New York stayed prosecution of that indictment on the ground that defendant's acquittal of charges arising out of the same incident bars further prosecution. But what happened on October 24, 1982 is irrelevant to the original intent of petitioner at the time of purchase on October 8, 1982. The government's attempt

to prejudice petitioner by misstatements of matters *outside* the record is utterly reprehensible.

Apart from these misrepresentation of facts, the government makes no serious argument that the hunting weapons purchased by petitioner were not excepted from the Gun Control Act. The government does not even advert to the part of the Act creating an exception for hunting shotguns. As to hunting rifles, the government merely asserts conclusorily that this exception depends upon action by the Secretary of the Treasury, an erroneous view fully dealt with in the petition (Pet. 19-20).

The government's belated recognition that "firearm" and "destructive device" are integrally related underscores that importance of this question and the necessity for this Court to consider and decide the matter authoritatively.

This reply to the government's brief in opposition has called attention to the extreme lengths to which government counsel have gone to prejudice petitioner and to prejudice consideration of this petition in this Court. The only reason that suggests itself for the government's tactics is to prevent fair consideration of the important questions presented for review by certiorari in this Court. The disservice to this Court is beyond measure.

The petition for writ of certiorari should be granted.

Respectfully submitted,

Jacob Kossman
1325 Spruce Street
Philadelphia, PA 19107

Counsel for Petitioner

APPENDIX

Dear

This refers to the correspondence which you have submitted to the Bureau which addresses the question (whether is precluded from obtaining Federal firearms licenses for the sales of firearms at new locations by reason of the fact that has been indicted under 18 U.S.C. § 371 and 542.) The materials you submitted indicated that the basis of the indictments returned against is that allegedly conspired to and did make false Customs declarations to avoid the assessment of antidumping duties on television receivers to be imported from Japan.)

(Under 18 U.S.C. § 921(a)(20), an indictment for a Federal or State offense pertaining to an unfair trade practice is not an indictment for a "crime punishable by imprisonment for a term exceeding one year" within the meaning of 18 U.S.C. Chapter 44. A federal firearms licensee is not, therefore, disabled as a result of such an indictment.)

(The antidumping duties were designed to help protect domestic industry by the elimination of unfair foreign competition. The circumstances which led to indictment under section 542 for allegedly entering merchandise into the commerce of the United States by means of false statements,) and hence those which led to the indictment based upon the alleged conspiracy to violate section 542, (are such that the indictments are for Federal offenses which "pertain to" unfair trade practices within the meaning of section 921(a)(20).) It follows that is not under a disability by reason of this indictment and that is not precluded from having its existing Federal firearms licenses renewed or being licensed at new business locations.

Appropriate officers of the Bureau responsible for the enforcement of Federal firearms laws are being advised concerning our determination of this matter.

If we can be of further assistance, please advise.

Sincerely yours,

(Signed) Robert J. Maxwell

Assistant Director
(Regulatory Enforcement)

Dear

This refers to your request for clarification from ATF as to which Federal offenses are not disabling offenses under the Federal firearms laws because they are exempted under 18 U.S.C. § 921(a)(20). In particular, you noted the question of "bid riggers."

Section 921(a)(20) provides in pertinent part:

> The term "crime punishable by imprisonment for a term exceeding one year" shall not include (A) any Federal or State offenses pertaining to antitrust violation, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate,...

The Secretary has not by regulation enumerated any such "similar offenses." The lack of any such regulation means that there are no "similar offenses" under section 921(a)(20) which are exempted from the term "crime punishable by imprisonment for a term exceeding one year." Therefore, the question becomes whether a particular offense is an offense pertaining to antitrust violations, unfair trade practices, or restraints of trade.

The term "antitrust laws" refers to statutes directed against unlawful restraints and monopolies. The goal of Federal antitrust laws is to safeguard the interplay of competitive forces in the far-flung commerce of the nation. *Cleary v. Chalk*, 488 F.2d 1315 (D.C. Cir. 1973). Unfair trade practices refers in general to the idea of unfair competition. The essence of the law in this area is insuring fair play among competitors and to the consumer by insuring that competition is vigorous but not deceptive. *Boston Pro Hockey v. Dallas Corp. & E. Manufacturing, Inc.*, 510

F.2d 1004 (5th Cir. 1975). The term "restraint of trade" has long had a definite meaning at common law, which was intentionally incorporated into the Sherman Act. That term is held to mean contracts or agreements for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrain production, and like practices which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from competition in the market. *Apex Hosiery Company v. Leader*, 310 U.S. 469, 497 (1940).

As indicated by the above, the category of offenses enumerated in section 921(a)(20) are closely related and are all directed at insuring the existence of a competitive marketplace. The legislative history of the Gun Control Act of 1968 indicates that section 921(a)(20) intended to exclude from its coverage only "offenses relating to antitrust violations and similar business offenses." *1968 U.S. Code Cong. & Ad. News* 4428. It was clearly not Congress' intent to include every offense relating to business within the exception contained in section 921(a)(20).

In accordance with the above, ATF has taken the position that violations of the Sherman Act and violations of 18 U.S.C. 542, the "antidumping" statute, are excepted from the term "crime punishable by imprisonment for a term exceeding one year" and hence are not disabling offenses under the Federal firearms laws. Additionally, we have taken the position that a conviction for conspiracy to violate the antitrust laws under 18 U.S.C. 371 is not a disabling offense because such a conviction is a conviction of an offense "pertaining to "anti-trust violations

within the meaning of section 921(a)(20). On the other hand, we have held that environmentla offenses, which related to public health and welfare, and violation of the anti-fraud provisions of the Securities Act of 1933 are not excepted.

As far as "bid rigging" is concerned, if the conviction involved is a conviction under the Sherman Act, then it would not be a disabling offense under the Federal firearms laws. On the other land, if the conviction is a conviction under some other statute, it would be necessary to examine the facts and circumstances of the particular case in accordance with the principles set forth above to determine whether the offense is one pertaining to antitrust violations, unfair trade practices, or restraints of trade.

If we can be of further assistance to you, feel free to contact us.

Sincerely yours,

Robert E. Sanders
Assistant Director
(Criminal Enforcement)